

ROTC DISENROLLMENT AND
TITLE IX SEXUAL ASSAULT HEARINGS
INFORMATION PAPER

1. PURPOSE. To provide an overview of the relationship between Title IX hearings at colleges and universities and the ROTC disenrollment process. This offers an overview of Title IX hearings, ROTC 15-6 investigations, and the disenrollment process. It further addresses potential issues for disenrollment in relation to these processes and offers considerations for disenrollment decisions. These considerations are a non-exhaustive list. Remember to seek advice from legal staff when specific circumstances arise in order to take all considerations into account.

2. OVERVIEW OF TITLE IX INVESTIGATIONS AND HEARINGS.

(a) In January of 2014, President Obama created the White House Task Force to Protect Students from Sexual Assault, directing that it “lead an interagency effort to address campus rape and sexual assault, including coordinating Federal enforcement efforts by executive departments and agencies and helping institutions meet their obligations under Federal law.” The President has continued to push for strong prevention, support, and response efforts on campuses. Based on numerous filed complaints against postsecondary institutions, the Department of Education has 253 ongoing investigations at 198 colleges and universities for failing to properly handle sexual violence on campus. This policy drive has placed colleges and universities under more scrutiny than ever for their handling of sexual assault.

(b) Title IX is a federal law that prohibits sex discrimination in education, where sex discrimination includes sexual harassment, gender-based discrimination, and sexual violence.¹ Every school is required to have a Title IX coordinator who will handle all complaints, and is the person to whom you should report any known assault.² The school is required to investigate promptly³ and is not allowed to wait for the conclusion of a criminal proceeding.

(c) Each school has different procedures for handling sexual assault claims, but each is supposed to meet certain requirements under Title IX. In any student conduct hearing, the evidentiary standard must be a preponderance of the evidence. Both students have the right to appeal any decision made by the school. The school can order no contact directives to both the complaining student and the accused student. Title IX also requires the school to provide accommodations to the complaining student if necessary, in that they receive help in changing classes, changing dorms, transportation, counseling services, and others. In order to not place all of the burden on the complaining student, the school can also have the accused student change some classes or school activities. The Department of Education states that any Title IX investigation conducted by the school must provide an equal opportunity to both parties to

¹ KNOW YOUR IX, <http://knowyourix.org/title-ix/title-ix-the-basics/>.

² *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf> (last visited 5 July 2016).

³ The Department of Education’s guidance is 60 days from the date of complaint to the finding.

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present relevant witnesses and other evidence, as well as timely and similar access to any information to be used at the hearing.⁴ All investigators, Title IX coordinators, and adjudicators must have some type of training for handling sexual violence complaints. Due process is required for the accused student at public and state-supported schools.

3. 15-6 INVESTIGATIONS AND THE DISENROLLMENT PROCESS.

(a) Disenrollment Board. Nonscholarship Cadets may be disenrolled by the PMS, while scholarship Cadets can only be disenrolled by the CG, ROTCCC.⁵ As to sexual assault, a Cadet can be disenrolled under the reasoning that those actions constituted (1) misconduct that substantially interferes with the ROTC mission, (2) undesirable character demonstrated by discreditable incidents with civil or university authorities, and/or (3) breach of contract. The latter two reasons for disenrollment require a board of officers appointed according to the procedures outlined in AR 15-6, Chapter 7. The former reason requires the PMS to appoint an investigating officer (IO) to inquire into the disenrollment evidence according to the procedures outlined in AR 15-6, Chapter 5.⁶ The IO and the Board use an evidentiary standard of preponderance of the evidence, the same as what is required for Title IX hearings.⁷ The purpose of the Board or the IO is “to determine the reasons for [disenrollment] and give students reasonable notice.”⁸ The Disenrollment Board and IO process are the accused Cadet’s opportunity to confront the evidence and claim against them.

(b) Information on which the Board or IO Can Rely. If there has been a criminal investigation and conviction, the Board or IO typically relies on the information from that investigation to determine its findings. If an SMP Cadet is investigated by their National Guard Unit, the Board or IO can also rely on the information from that investigation. The Board or IO can also rely on the information from an investigation conducted by the school, such as a Title IX investigation and hearing. While it is possible to rely on the information from the investigations listed, it is important to be confident in the sufficiency of the investigation and to keep in mind the considerations noted below.

(c) 15-6 Investigations. If the PMS or Brigade Commander feels that there is insufficient information on which to base an informed decision, they can request a 15-6 investigation. If a criminal investigation of the misconduct is underway, the 15-6 investigation should not occur until after the criminal investigation is completed.⁹ While not required, it is common practice to

⁴ Russlynn Ali, *Dear Colleague Letter*, U.S. DEP’T OF EDUC. OFFICE OF THE ASSISTANT SEC’Y, 11 (April 4, 2011), <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>.

⁵ AR 145-1, para. 3-43.

⁶ Cadet Command, Pam. 145-4, para. 6-6.

⁷ AR 15-6, para. 3-10.b.

⁸ DODI 1215.08, para. 6.3.5.

⁹ DODI 5505.18.

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not conduct a concurrent 15-6 investigation while a Title IX investigation is underway. The 15-6 investigation should only be used if the PMS or Brigade Commander feels that there has been no investigation, or if a conducted investigation (whether by the National Guard, Title IX, etc.) did not provide enough information on the case to make an informed decision.

4. POTENTIAL ISSUES.

(a) Potential issues can arise when different findings occur between the Title IX investigation and another investigation, or between the Title IX investigation and the Disenrollment Board. Because the evidentiary standard for a criminal conviction is beyond a reasonable doubt, there is typically no issue when a final disenrollment decision is based on information from a criminal conviction. Cases become more complicated, however, when there is no finding of criminal guilt, there are conflicting findings among different hearing authorities, and/or other findings may potentially be based on insufficient information.

(b) For example, if the Cadet is SMP, a Title IX investigation could find an accused responsible, while the Cadet's National Guard unit could find that the misconduct did not take place. The disenrollment authority would need to then decide if s/he could rely on the facts from those other investigations, or if s/he needed to conduct their own. Another example is if the Title IX investigation results in a finding of responsible, but a Disenrollment Board does not find the accused to have committed misconduct. The disenrollment authority must then weigh the findings, the information on which both hearings relied, and other considerations.

(c) With multiple lawsuits being brought against universities for lack of due process in Title IX proceedings, there is the possibility of a Disenrollment Board relying on information from a Title IX hearing that is later found to be insufficient by a court. On the other side, another potential issue is if a Title IX hearing finds the accused not responsible but the hearing process improperly handled the complaint. The Department of Education is investigating 198 postsecondary institutions for failing in this regard, and so relying solely on a finding of not responsible by a Title IX investigation could run the risk that the misconduct actually occurred and the school's process was inadequate. These are only some of the examples of issues that could arise, which make it more difficult to determine whether to do an independent 15-6 investigation, how to handle the involved Cadets during the process, and when to disenroll a Cadet. The next section outlines some considerations to help in these difficult determinations.

5. CONSIDERATIONS FOR DISENROLLMENT.

(a) Relationship with the University. If a disenrollment is not pursued when a Title IX investigation has found the accused to be responsible, the university president is able to make a complaint against ROTC. Even without an official complaint by the school against ROTC, other

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aspects of the necessary relationship could become strained. Full communication is encouraged with the university.

(b) Conducting an Independent 15-6 Investigation. It can be difficult to decide when it may be beneficial to conduct an independent 15-6 investigation. A 15-6 investigation is typically needed if there is not sufficient information on which to base a decision about disenrollment. This can be difficult to determine when another investigation has taken place, such as a Title IX investigation. Below are some considerations to help in that decision.

(i) Ask the university for all of the investigation and hearing materials. Some schools will deny this request, but some will comply and will help you to better understand the depth of that investigation.

(ii) Review any due process concerns of the accused Cadet with legal staff to help determine if it impeded a proper and unbiased investigation.

(iii) Determine if the university is under investigation by the Department of Education for failing to properly handle sexual assault complaints. To find if your school is under investigation, you can contact the Department of Education Office for Civil Rights (1-800-421-3481 or ocr@ed.gov) and also search in the database located at: <http://projects.chronicle.com/titleix/>.

(iv) Determine if the university had the cooperation of the victim. This can have some effect on the thoroughness of the investigation.

(v) Consider any logistical problems of conducting a 15-6 investigation when one or more other investigations have occurred. A long time delay can affect witness memories and other evidence. Consider the number of interviews the parties, especially the victim, may have already done and if it is prudent to put all of the parties through more.

(vi) Determine the particular procedures and trainings of the Title IX process at your individual university. Training of personnel and procedures can vary widely by university, so familiarizing yourself with those procedures can help you to better determine the sufficiency of the university's Title IX investigation. To understand the hearing process at your school as well as the training required of those involved, contact the school's Title IX coordinator and refer to their sexual misconduct policy.

(c) If Both Parties are Cadets. Additional issues may arise if both the accused and the complaining student are Cadets. Once an accused Cadet is notified that a Disenrollment Board or IO process has begun, the Cadet is placed on a Leave of Absence from the program.¹⁰ Before that, however, a Leave of Absence for the accused Cadet is something to consider. Issuing no contact orders to both parties is also a possibility. Another consideration is a separation of the Cadets from each other in ROTC classes as well as training, so that neither continues to work with each other in the Cadet Chain of Command. Per Title IX, universities are required to provide certain accommodations to complaining parties before any decision has been reached.

¹⁰ AR 145-1, para. 3-43c.

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For example, the student filing a complaint can get help with changing classes, dorms, and transportation assistance. ROTC units will be expected to comply with these requests. Further, a university can also have the accused Cadet change classes or some school activities, which is a further consideration for the ROTC unit.

(d) Local Law Enforcement. ROTC cadre are often considered mandatory reporters by the school, which mean they are required to report sexual assault incidents involving any of their Cadets to the school. Cadre are not required to report these incidents to the local law enforcement, but Cadre should check local state law to verify if their state has mandatory reporting laws. If the Cadet is SMP, the cadre should report the assault to that Cadet's Guard or Reserve unit. If the Cadet is an active duty Green to Gold Cadet, the case should be reported to CID.

SOURCES FOR CADRE:

DODI 1215.08, para. 6.3.5

Cadet Command, Pam. 145-4, Chapter 6

AR 15-6

AR 145-1, para. 3-43

Department of Education Dear Colleague Letter (April 4, 2011),

<http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>

Know Your IX, <http://knowyourix.org/>